

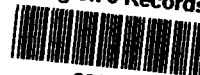


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

EPA Region 5 Records Ctr.



226278

REPLY TO THE ATTENTION OF

VIA FAX AND FIRST CLASS MAIL

July 27, 2000

Mr. John George
Daley and George
20 S. Clark
Suite 400
Chicago, Illinois 60603

Re: Radiological Survey of Properties Located at 600 N. Michigan
Avenue and 530 N. Michigan Avenue, Chicago IL

Dear Mr. George:

As we discussed during our phone conversation yesterday, Wednesday, July 26, 2000, the U.S. Environmental Protection Agency is seeking access to your clients' properties located at 600 N. Lake Shore Drive and 530 N. Lakeshore Drive. I explained that as part of its investigation of the disposal of radioactive material from the Lindsay Light and Chemical Company (Lindsay Light) thorium mantle manufacturing plant at 316 E. Illinois, U.S. EPA was conducting radiological surveys of certain properties in the Streeterville area.

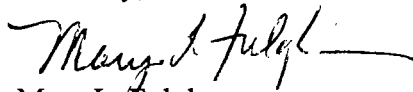
During our conversation, you indicated a willingness to authorize U.S. EPA to conduct a radiation walkover survey of these properties, however, you insisted that the access agreement contain an indemnification clause for your client. As I explained during our call, U.S. EPA can not agree to any indemnification clause. Although I understand your legitimate concerns for your clients' potential liability should an EPA employee sustain injury at the property, U.S. EPA simply lacks the statutory authority to indemnify your clients. Government employees are expressly forbidden by the Anti-Deficiency Act, 31 U.S. C. 665 (a), from obligating federal funds (in this instance, funds to indemnify or hold harmless the property owner) without statutory authorization. Further, in as much as the Section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S. C. 9601 et seq. (CERCLA), grants U.S. EPA employees a right of entry to a property, the exercise of the right of entry may not be conditioned upon the signing of an indemnity agreement. If access is conditioned by an indemnification provision, U.S. EPA employees are instructed to treat the condition as a denial. For additional background information regarding this long-standing requirement, I have enclosed a copy of an U.S. EPA Office of General Counsel Opinion dated November 8, 1972. Please advise me immediately, if you intend to deny access by requiring indemnification or hold

harmless agreements for your clients.

If your clients will provide access, please have them sign the appropriate enclosed consent. This consent for access provides U.S. EPA employees access to your property to conduct radiation surveillance and sampling. Note that this consent is for access for a radiation walkover and sampling purposes only. If access is required for other purposes, a broader access agreement will be necessary. Please fax the signed copies to my office at (312) 886-0747 and return the originals by regular mail. I have also enclosed, for your information, a copy of the request for access made to William Alter several weeks ago that explains why U.S. EPA is investigating undeveloped properties in the Streeterville neighborhood..

As we also discussed in our phone conversation, U.S. EPA would like to accompany your environmental consultants when they conduct any radiological surveys or sampling at the properties. It may be possible for U.S. EPA and your clients' consultants to conduct their survey and sampling work at the same time. Assuming your client will provide access, please have them call one of U.S. EPA's On-Scene Coordinators, Verneta Simon at (312) 886-3601 or Fred Micke at (312) 886-5123 to make arrangements. Of course, if you have further questions please call me at (312) 886-4683. During the week of July 31 through August 4, I will be on vacation and you may call my co-counsel, Jose DeLeon at (312) 353-7456. I appreciate your assistance in this matter.

Sincerely,



Mary L. Fulghum
Associate Regional Counsel

enclosures

cc: Jose Deleon, ORC
Verneta Simon, OSC
Fred Micke, OSC

Environmental Protection Agency (E.P.A.)
Office of the General Counsel

General & Administrative

*1 November 8, 1972 [FNa1]

FACTS

As a condition to entry on industrial facilities, certain firms have required EPA employees to sign agreements which purport to release the company from tort liability. The following "Visitor's Release" required by the Owens-Corning Fiberglass Corporation is an example:

VISITOR'S RELEASE

In consideration of permission to enter the premises of Owens Corning Fiberglass Corporation and being aware of the risk of injury from equipment, negligence of employees or of other visitors, and from other causes the

undersigned assumes all risk, releases said corporation, and agrees to hold it harmless from liability for any injury to him or his property while upon its premises...

READ CAREFULLY BEFORE SIGNING

In addition to such "Visitor's Releases" employees or their supervisors have been asked to sign entry permits which include an agreement that EPA will pay for any injury or damage resulting from our activities at the facility.

QUESTIONS

1. Does signing such a "Visitor's Release" effectively waive the employee's right to obtain damages for tortious injury?
2. May EPA employees contractually obligate the Agency to pay for any injury or damage caused by our activities?
3. May firms condition EPA's entry upon signing such agreements?

ANSWERS

1. Generally, yes; employees waive their right to damages and the government is prevented from exercising its right of subrogation under the Federal Employees' Compensation Act.
2. No; Federal tort liability is established and limited by the Federal

Tort Claims Act, and such agreements are also invalid as violative of the Anti-Deficiency Act.

3. No; EPA employees possess a right of entry under both the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972.

DISCUSSION

Although the precise effect of an advance release of liability for negligence cannot be determined without reference to the law of the state in which the tort occurs, we must assume that such agreements are generally valid. By signing such agreements EPA employees may effectively waive their right to sue for damages and the government's right of subrogation under the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq.

The Restatement of Contracts, Ch. 18 S575 states:

(1) A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if

(a) the parties are employer and employee and the bargain relates to

negligent injury of the employee in the course of the employment, or,

(b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation...

With the exceptions mentioned in the Restatement of Contracts, supra, no general public policy seems to exist against express agreements for assumption of risk, and they need not be supported by consideration. 10 Prosser on Torts S 55 and Restatement of Torts 2d, Ch. 17A, S496B. Despite this general rule, cases arising under the Federal Tort Claims Act involving releases signed by civilian passengers prior to boarding ill-fated government aircraft indicate that the courts do not favor such agreements. (*Friedman v. Lockheed Aircraft Corp.*, 138 F. Supp. 530 (1956) - a release is no defense against gross, willful, or wanton negligence in New York; *Rogow v. U.S.*, 173 F. Supp. 547 (1959) a release is ineffective unless the flight is gratuitous; *Montellier v. U.S.*, 315 F2d 180 (1963) - a release does not destroy a cause of action for wrongful death in Massachusetts). Such apparent judicial disfavor of advance releases is, of course, insufficient justification for assuming the risk of signing them, and ordinary prudence requires us to assume their validity. Although signing a release does not affect the employee's right to benefits under FECA, such compensation will ordinarily be much less than might be

recovered in a tort action against the negligent corporation.

*2 Since the Federal Employees' Compensation Act, 5 U.S.C. 8131 and 8132, provides that an employee may be required to assign his right to sue third parties to the United States and that the employee must, within limitations,

pay over any recovery from third parties as reimbursement of FECA benefits, the employee's release prejudices the government's rights as well as his own. Employees should therefore be instructed not to sign such releases under any circumstances.

Although an EPA employee's express assumption of the risk of injury to himself may be valid, and agreement which purports to obligate EPA to pay all damages caused by our activities is not. The Federal Tort Claims Act, 28 U.S.C. 2674 provides:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages...

Congress has granted only a limited waiver of the government's sovereign immunity, and 28 U.S.C. 2680 lists exceptions to the general waiver stated in 28 U.S.C. 2674, supra. Exceptions which might be relevant in cases arising out of the actions of EPA employees include 28 U.S.C. 2680(a):

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused; and 28 U.S.C. 2680(b):

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights ...

Since the government's tort liability is limited by statute, an administrative undertaking to expand such liability by contract is probably invalid. In any event, EPA should not create the occasion for judicial resolution of the question.

An additional basis for considering such indemnification agreements invalid is the Anti-Deficiency Act, which provides at 31 U.S.C. 665 (a):

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein ...

Since the extent of the government's obligation is uncertain, the Comptroller General has stated that a contractual assumption of tort liability is not a lawful obligation of the United States, and payment may not be made pursuant to

such agreement. (7 CG 507, 15 CG 803, and 35 CG 86). In fairness to companies which may rely upon the validity of such indemnity provisions, employees should be instructed not to sign them.

Inasmuch as the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972 grant EPA employees a right of entry to corporate

facilities, a company may not lawfully condition the exercise of this right upon the signing of a release or indemnity agreement. The Clean Air Act provides, at 42 U.S.C. 1857c - 9(a)(2):

*3 ... the Administrator or his authorized representative, upon presentation of his credentials - (A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located...

The procedure for enforcement of this right is provided in 42 U.S.C. 1857c - 8:

(a)(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of ... any requirement of Section 1857c - 9 of this title, he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section. (b) The Administrator may commence a civil action for appropriate relief, including

a permanent or temporary injunction, whenever any person - (4) fails or refuses to comply with any requirement of Section 1857c - 9 of this title.

When a firm refuses entry to an EPA employee performing his functions under the Clean Air Act, the employee may appropriately cite the statute and remind the company of EPA's right to seek judicial enforcement. If the company persists in its refusal, EPA should go to court in preference to signing a "Visitor's Release".

In addition to procedure for judicial enforcement similar to that of the Clean Air Act, the Federal Water Pollution Control Act Amendments of 1972 reinforce EPA's right of entry with criminal and civil penalties. Section 309 states:

(c)(1) Any person who willfully or negligently violates Section... 308 of this Act (Note - Section 308 establishes the right of entry) ... shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both. (3) For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in Section 502(5) of this Act, any responsible corporate officer. (d) Any person who violates Section ...

308 of this Act ... and any person who violates any order issued by the Administrator under subsection (a) of this section (Note - subsection (a) provides for administrative orders to enforce the right of entry), shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

In *See v. Seattle*, 387 U.S. 541 (1967) the Supreme Court reversed the conviction of a corporation for refusal to admit building inspectors of the

City of Seattle. Justice White held that the Fourth and Fourteenth Amendments required a warrant for such inspections, even where the search was reasonably related to protecting the public health and safety and even where a corporation, rather than an individual, was the subject. Under See evidence obtained by inspectors of the Food and Drug Administration has been held inadmissible where the inspectors obtained consent to enter by threatening prosecution under 21 U.S.C. 331, which provides criminal penalties for refusal to permit entry, U.S. v. Kramer Grocery Co., 418 F2d 987 (8th Cir., 1969). Although two more recent Supreme Court decisions, Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) and U.S. v. Biswell, 92 S. Ct. 1593 (1972), may create doubt as to whether See retains its original vigor (see Memorandum of the Assistant to the Deputy General Counsel, September 29, 1972), the possibility that evidence obtained under the FWPCA Amendments of 1972 will be ruled inadmissible is a risk EPA need not assume.

*4 Since the Amendments provide for judicial enforcement of the right of

entry, EPA employees should be instructed not to mention the civil or criminal penalties of Section 309 when faced with a refusal to permit entry. When such refusals occur, this office should be informed immediately so that a decision can be made as to whether to issue an order of the Administrator under 309(a) or seek an appropriate judicial remedy under 309(b).

FNa1. Note: Marshall v. Barlow's, Inc. 98 S. Ct. 1816 (1978) affects the cases cited herein. A search warrant is required for such administrative inspections. There is an OGC memo dated June, 1978, discussing the effect of Barlow's. 1972 WL 21383 (E.P.A.G.C.)
END OF DOCUMENT

CONSENT FOR ACCESS TO PROPERTY
530 N. Lakeshore Drive

Name:

Address of Property: **530 N. Lakeshore Drive**
 Chicago, Illinois

I consent to officers, employees, contractors, and authorized representatives of the United States Environmental Protection Agency (U.S. EPA) entering and having continued access to this property to conduct a walkover radiological survey and sampling and investigatory activity on the property.

U.S. EPA has stated that these actions are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9601-9675 (1997).

This written permission is given by me voluntarily, on behalf of myself and all other co-owners of this property, with knowledge of my right to refuse and without threats or promises of any kind.

Date

Property Owner (Name and Title)

CONSENT FOR ACCESS TO PROPERTY
600 N. Lakeshore Drive

Name:

Address of Property: 600 N. Lakeshore Drive
Chicago, Illinois

I consent to officers, employees, contractors, and authorized representatives of the United States Environmental Protection Agency (U.S. EPA) entering and having continued access to this property to conduct a walkover radiological survey and sampling and investigatory activity on the property.

U.S. EPA has stated that these actions are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9601-9675 (1997).

This written permission is given by me voluntarily, on behalf of myself and all other co-owners of this property, with knowledge of my right to refuse and without threats or promises of any kind.

Date

Property Owner (Name and Title)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO IL 60604-3590

REPLY TO THE ATTENTION OF

June 28, 2000

HSE-5J

VIA FAX AND U.S. MAIL

Mr. William A. Alter
The Alter Group
7303 N. Cicero Avenue
Lincolnwood, IL 60712

Re: Walkover Survey of Vacant Lot 4XX Ohio Street

Dear Mr. Alter:

On Wednesday, June 21, 2000, Mary Fulghum, Associate Regional Counsel, U.S. Environmental Protection Agency, telephoned you and explained that U.S. EPA is seeking access your vacant lot located in the 400 block of Ohio Street in downtown Chicago. Ms. Fulghum explained that as part of its investigation of the disposal of radioactive material from the Lindsay Light and Chemical Company (Lindsay Light) thorium mantle manufacturing plant at 316 E. Illinois, U.S. EPA was conducting radiological surveys of certain properties in the area. During your conversation with Ms. Fulghum, you indicated your willingness to authorize U.S. EPA to conduct a radiation walkover survey of the vacant lot property located at the 400 block of Ohio Street which is fenced, gated and locked. We anticipate that a walkover survey would take no more than four to six hours. Enclosed with this letter is a form allowing U.S. EPA access to conduct a walkover radiation survey of the vacant lot.

As you may have learned from recent newspaper articles or from one of U.S. EPA's Lindsay Light Fact Sheets, from 1915 until approximately 1932, Lindsay Light refined thorium containing ores and manufactured incandescent mantles for residential and commercial building lights at 316 E. Illinois. The gas mantle manufacturing involved dipping gauze mantle bags into solutions containing radioactive thorium. This former manufacturing site that is bounded by Columbus, Grand, McClurg Court, and Illinois is known as the Lindsay Light II site. (It is called Lindsay Light II because the original facility and main offices were located at 161 East Grand.) Presently, Kerr-McGee Chemical L.L.C., River East L.L.C. and Grand Pier L.L.C. are completing a removal actions at the Lindsay Light II site pursuant to an U.S. EPA administrative order issued under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or more commonly known as "Superfund").

U.S. EPA believes it is possible that radioactive materials from the Lindsay Light operations or demolition may have been placed onto your property. Asphalt and concrete effectively shield the gamma radiation from this material but once the asphalt and concrete is removed during development activities there may be a potential threat to human health and the environment. During your phone conversation with Mary Fulghum, you mentioned that an environmental assessment of the vacant lot property recently was conducted. It would be very helpful to U.S. EPA if you could provide a copy of that environmental assessment, whether or not it includes a radiological assessment, because it will add to our understanding of the area. Also, any geotechnical boring information would also be helpful to our investigation.

The enclosed consent for access provides U.S. EPA and its representatives access to your property to conduct radiation surveillance and sampling. Please sign this consent for access and return it to us as soon as possible. Note that this consent is for access for a radiation walkover and sampling purposes only. If access is required for other purposes, a broader access agreement will be necessary. Also, because the property is gated and locked, we will need to coordinate with the Alter Group to open the gate to allow us access and lock it after we have finished.

Please contact either myself at (312) 886-5123 or Verneta Simon, On-Scene Coordinator at (312) 886-3601, if there is additional information we can provide to you. Please direct legal matters to Mary Fulghum, Associate Regional Counsel, at (312) 886-4683. Thank you for your continued cooperation.

Sincerely,

Fredrick A. Micke

Fredrick A. Micke, P.E.
On-Scene Coordinator
EEB Section #3

Enclosure

CONSENT FOR ACCESS TO PROPERTY

Name: William A. Alter, President
The Alter Group
7303 North Cicero Avenue
Lincolnwood, Illinois 60712

Address of Property: Vacant Lot
4XX Block Ohio Street
Chicago, Illinois

I consent to officers, employees, contractors, and authorized representatives of the United States Environmental Protection Agency (U.S. EPA) entering and having continued access to this property to conduct a walkover radiation survey and sampling on the property.

I realize that these actions taken by U.S. EPA are undertaken pursuant to its response and enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9601-9675 (1997).

This written permission is given by me voluntarily, on behalf of myself and all other co-owners of this property, with knowledge of my right to refuse and without threats or promises of any kind.

Date

William A. Alter, President